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**IN THE  
COURT OF APPEALS OF INDIANA**

MICHAEL OLSON,

Appellant-Defendant,

VS.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 55A04-0511-CR-669

APPEAL FROM THE MORGAN SUPERIOR COURT

The Honorable G. Thomas Gray, Judge

Cause No. 55D01-0409-CM-262

**October 16, 2006**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

## SHARPNACK, Judge

Michael Olson brings this interlocutory appeal from the trial court's denial of his motion for discharge pursuant to Ind. Criminal Rule 4. Olson raises one issue, which we restate as whether the trial court erred by denying Olson's motion for discharge. We affirm.

The relevant facts follow. On September 10, 2004, the State charged Olson with operating a vehicle while intoxicated endangering a person as a class A misdemeanor,<sup>1</sup> operating a vehicle with a blood alcohol content of .15 or more as a class A misdemeanor,<sup>2</sup> and public intoxication as a class B misdemeanor.<sup>3</sup> The trial court scheduled the jury trial for March 17, 2005, as a first choice and March 10, 2005, as a second choice. On February 15, 2005, the trial court rescheduled the jury trial for May 19, 2005, as a first choice, and May 10, 2005, as a second choice due to the involuntary evacuation of the courthouse. On April 21, 2005, the trial court rescheduled the trial dates for August 9, 2005, as a first choice and July 21, 2005, as a second choice because of the involuntary evacuation of the courthouse. On June 8, 2005, the trial court continued the trial date of July 21, 2005, because of the involuntary evacuation of the courthouse. On August 9, 2005,<sup>4</sup> the trial court issued an order for continuance and

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<sup>1</sup> Ind. Code § 9-30-5-2 (2004).

<sup>2</sup> Ind. Code § 9-30-5-1 (2004).

<sup>3</sup> Ind. Code § 7.1-5-1-3 (2004).

<sup>4</sup> The order is stamped "AUG 18 2005," however the order states "DATED: AUG – 9 2005," and the chronological case summary reveals that the trial court issued the order on August 9, 2005. See

rescheduled the trial for October 20, 2005, as a first choice and October 13, 2005, as a second choice. The trial court's order stated, in part:

The Morgan Superior Court No. 1 hereby orders this matter continued from its present trial date of August 9, 2005. This order is being made because of the involuntary evacuation of the Morgan County Courthouse by all four courts. This matter is set for August 9, 2005 for Jury Trial. Presently the four courts of Morgan County have only one suitable jury room and that jury room is being used on August 9, 2005 by the Morgan Superior Court No. 2 for the matters of State of Indiana vs. John T. McGuire, Case No. 55D02-0409-FC255 and State of Indiana vs. John H. McGuire, Case No. 55D02-0409-FC257.

[Olson] is presently not incarcerated in this matter although this matter cannot be placed back on the Court's calendar until after the one year rule under Criminal Rule 4 has run, the Court feels that because of the extenuating circumstances and the congested court situation presently in Morgan County, this matter must be continued.

Appellant's Appendix at 21.

On August 15, 2005, Olson objected to the continuance. On September 29, 2005, the trial court indicated that the first choice for the jury trial was October 13, 2005. On October 3, 2005, Olson filed a motion for discharge pursuant to Ind. Criminal Rule 4(C), which the trial court later denied. Olson filed a request for certification of an interlocutory appeal, and the trial court granted the motion. Thereafter, we accepted jurisdiction of the interlocutory appeal pursuant to Ind. Appellate Rule 14(B).

The issue is whether the trial court erred by denying Olson's motion to dismiss. We review this matter de novo. See Vaughan v. State, 470 N.E.2d 374, 377 (Ind. Ct.

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Appellant's Appendix at 3, 21.

App. 1984) (implicitly reviewing an Ind. Criminal Rule 4(B) question about which party was responsible for a delay under a de novo standard), reh'g denied, trans. denied. See also Kirby v. State, 774 N.E.2d 523, 530 (Ind. Ct. App. 2002), reh'g denied, trans. denied.

Olson argues that September 10, 2005, was the last day he could be tried under Ind. Criminal Rule 4(C). Ind. Criminal Rule 4(C) provides:

No person shall be held on recognizance or otherwise to answer a criminal charge for a period in aggregate embracing more than one year from the date the criminal charge against such defendant is filed, or from the date of his arrest on such charge, whichever is later; except where a continuance was had on his motion, or the delay was caused by his act, or where there was not sufficient time to try him during such period because of congestion of the court calendar; provided, however, that in the last-mentioned circumstance, the prosecuting attorney shall file a timely motion for continuance as under subdivision (A) of this rule. Provided further, that a trial court may take note of congestion or an emergency without the necessity of a motion, and upon so finding may order a continuance. Any continuance granted due to a congested calendar or emergency shall be reduced to an order, which order shall also set the case for trial within a reasonable time. Any defendant so held shall, on motion, be discharged.

The rule places an affirmative duty on the State to bring a defendant to trial within one year of being charged or arrested but allows for extensions of that time for various reasons. Ritchison v. State, 708 N.E.2d 604, 606 (Ind. Ct. App. 1999), reh'g denied, trans. denied. The Indiana Supreme Court recently held that delays caused by actions taken by a defendant are chargeable to the defendant regardless of whether a trial date has been set. Cook v. State, 810 N.E.2d 1064, 1065 (Ind. 2004). When a motion for discharge for an Ind. Criminal Rule 4 violation is made prematurely, it is properly denied.

Stephenson v. State, 742 N.E.2d 463, 487, n.21 (Ind. 2001), cert. denied, 534 U.S. 1105, 122 S. Ct. 905 (2002).

Upon appellate review, a trial court's finding of court congestion will be presumed to be valid and need not be contemporaneously explained or documented by the trial court. Clark v. State, 659 N.E.2d 548, 552 (Ind. 1995). A defendant may challenge that finding by filing a motion for discharge and demonstrating that, at the time the trial court made its decision to postpone the trial, the finding of congestion was factually or legally inaccurate. Id.; see also Bridwell v. State, 659 N.E.2d 552, 554 (Ind. 1995) (“[A] defendant must present evidence, either at the time of the motion for discharge or upon a motion to correct error, demonstrating that the finding of ‘congestion’ is clearly erroneous.”). “Such proof would be prima facie adequate for discharge, absent further trial court findings explaining the congestion and justifying the continuance.” Id. “In the appellate review of such a case, the trial court’s explanations will be accorded reasonable deference, and a defendant must establish his entitlement to relief by showing that the trial court was clearly erroneous.” Id.

The State charged Olson on September 10, 2004. Thus, the State was required to bring Olson to trial by September 10, 2005, unless the one-year period was extended by delays not chargeable to the State. On February 15, 2005, April 21, 2005, June 8, 2005, and August 18, 2005, the trial court rescheduled the jury trial date because of the involuntary evacuation of the courthouse. In the last of these orders, the trial court scheduled the trial for October 20, 2005, as a first choice and October 13, 2005, as a

second choice. The trial court eventually rescheduled the trial for October 13, 2005. This extended the one-year deadline by 240 days to May 8, 2006.<sup>5</sup>

On October 3, 2005, Olson filed a motion for discharge pursuant to Ind. Criminal Rule 4(C), which the trial court denied. Olson's motion for discharge did not cite any factual basis or evidence that the finding of an involuntary evacuation or congestion was factually or legally inaccurate. Thus, Olson has not met the requisite showing that the trial court's findings of an involuntary evacuation and congestion were clearly erroneous.<sup>6</sup> See, e.g., Vaillancourt v. State, 695 N.E.2d 606, 610 (Ind. Ct. App. 1998)

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<sup>5</sup> This delay was computed by calculating the delay between February 15, 2005, and October 13, 2005.

<sup>6</sup> Olson's motion to dismiss merely stated, in part:

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6. The Defendant is now and has been since September 5, 2005 entitled to discharge under the provisions of Indiana Rules of Procedure, C.R. 4(C).
7. According to the Court's Chronological Case Summary in this case, the last jury trial set prior to September 5, 2005 was August 9, 2005. That date was continued by the Court over objections by [Olson] by the Court until October 13, 2005 when it set the matter for jury trial[.]

WHEREFORE, [Olson] requests this Court to dismiss the information and discharge [Olson].

Appellant's Appendix at 23-24.

On appeal, Olson argues that the situation is "longstanding and foreseeable" and that the "foreseeability of the emergency created by the 'involuntary evacuation of the Courthouse' made it unreasonable for the trial court to routinely continue trial dates, knowing that eventually such continuances would violate Olson's speedy trial right." Appellant's Brief at 7. Olson contends that "[i]t was an abuse of discretion to fail to guarantee the availability of a suitable court and jury room in which to conduct the jury trial." Id. We note that Olson did not make these arguments to the trial court. Thus, these arguments are waived on appeal. See Taylor v. State, 710 N.E.2d 921, 923 (Ind. 1999) (holding that a defendant is limited to the specific grounds argued to the trial court and cannot assert new bases for

(holding that trial court did not err when it denied defendant's motion for discharge when defendant failed to cite any evidence for his contention that the delay was not due to the congestion of the court calendar), trans. denied. Thus, we conclude that Olson's motion was premature and his right under Ind. Criminal Rule 4(C) to be brought to trial within one year of being charged was not violated. Thus, the trial court properly denied Olson's motion for discharge under Ind. Criminal Rule 4(C). See, e.g., Cook, 810 N.E.2d at 1068 (holding that defendant's right under Ind. Criminal Rule 4(C) was not violated).

For the foregoing reasons, we affirm the trial court's order denying Olson's motion for discharge.

Affirmed.

KIRSCH, C. J. and MATHIAS, J. concur

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admissibility of statements for the first time on appeal).